

A Shigenori Ono v Thong Foo Ching & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7-22-189-1990
LIM BENG CHOON J
20 JUNE 1991

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Civil Procedure — Summary judgment — Agreements for sale of properties and shares in company — Plaintiff rescinding agreements — Breach of contract alleged by plaintiff — Plaintiff alleging fraud in statement of claim — Allegation withdrawn at hearing of application for summary judgment — Conflicting affidavits — Whether triable issues raised — Whether judgment may be given on grounds other than the alleged fraud — Rules of the High Court 1980 O 14 — Contracts Act 1950 ss 40, 52 & 57(2)

C**D****E****F****G****H****I**

The plaintiff had entered into an agreement with the third defendant and a second agreement with the first and second defendants. He brought an action seeking declaratory orders that the agreements were lawfully rescinded and further and in the alternative that the agreements were void in law and that he was entitled to claim a refund of all the payments made by him to the defendants in respect of the agreements. The first agreement was for the sale by the third defendant to the plaintiff of two pieces of land. The second agreement was for the sale to the plaintiff of two shares of \$1 each in a certain company. On 12 March 1990, an ex parte injunction was obtained by one Golden Scoope Sdn Bhd against the third defendant in a suit restraining the third defendant 'from selling, disposing, renting, transferring or in any way dealing with' the properties. Up to 2 March 1991 the injunction had not been set aside. On 10 April 1990 the plaintiff rescinded the agreements. It was contended for the plaintiff that the two agreements were related to one transaction, ie that the sale of the properties and the sale of the shares were interdependent. It was contended that there was an orally expressed or implied term that the share sale agreement was subject to the land sale agreement and that it would determine if the land sale agreement should be terminated by reason of the default of the third defendant.

The plaintiff applied for leave to enter summary judgment. The defendants denied that the two agreements were interdependent and related to one transaction. It was contended also that as the application for summary judgment included a claim based on fraudulent misrepresentation, the plaintiff was not entitled to summary judgment in view of O 14 r 1(1)(b) of the Rules of the High Court 1980. It was also contended that as the completion date of the land sale agreement was 18 April 1990, on which date the application for an order setting aside the injunction was to be heard, the plaintiff's action in rescinding the agreement on 10 April 1990 was premature and therefore the plaintiff had himself repudiated the agreement before the completion date. It was therefore submitted that performance of the third defendant's obligation to deliver vacant possession of the properties to the plaintiff had been postponed indefinitely by the operation of s 52 of the Contracts Act 1950.

At the hearing of the plaintiff's application, his counsel said that the plaintiff would abandon such a claim of fraud.

Held, dismissing the plaintiff's application in part:

- (1) The allegation that the third defendant had failed to disclose the tenancy agreement with Golden Scoope Sdn Bhd could not be construed as an allegation of fraud. It merely fortified the plaintiff's claim that the third defendant was not able to deliver vacant possession of the properties as the encumbrances caused by the tenancy agreement and the Dewan Bandaraya's development order and notice prevented them from doing so.
- (2) The allegation that the first defendant acting on behalf of the third defendant made representations to the plaintiff which were false or which were made recklessly not caring whether they were true or false fell within the area of fraud. However, the plaintiff's counsel had said quite clearly that the plaintiff would abandon such a claim of fraud. There is no legal inhibition against the plaintiff's abandonment of his pleading of misrepresentation in his application for summary judgment so long as he does not attempt to utilize directly or indirectly the misrepresentation to support his case. The plaintiff could not be precluded from applying for summary judgment in respect of the first two causes of action based on breaches of the land sale agreement and frustration of the said agreement.
- (3) There was no doubt that the third defendant had entered into a tenancy agreement with Golden Scoope Sdn Bhd to let out the ground floor of the new building which was to be built on the properties. There was equally no doubt that the tenancy agreement was made behind the back of the plaintiff. Having sold the properties to the plaintiff the third defendant had no right to enter into the tenancy agreement without the knowledge of the plaintiff. In doing so, clearly the third defendant disabled itself from delivering vacant possession of the properties to the plaintiff under the agreement when the plaintiff was willing and able to pay the full purchase price by the agreed date of completion.
- (4) The injunction obtained by Golden Scoope Sdn Bhd had the effect of frustrating the land sale agreement.
- (5) The plaintiff was entitled to rescind the land sale agreement because of the breach of the agreement by the third defendant and the injunction preventing it from completing the said agreement.
- (6) Although the land sale agreement and the share sale agreement were executed on the same date yet there was nothing either in the land sale agreement or the share sale agreement to indicate that the two were linked and of which performance was interdependent. At this interlocutory stage it was difficult if not impossible to resolve the issue. The plaintiff had failed to establish even a *prima facie* case to support his right to rescind the share sale agreement and was therefore not entitled to summary judgment on that issue.

A [Bahasa Malaysia summary]

Plaintif telah mengikat satu persetujuan dengan defendan ketiga dan satu persetujuan kedua dengan defendan pertama dan kedua. Beliau mengambil tindakan untuk memohon perintah deklaratori bahawa persetujuan itu telah dibatalkan (rescinded) dengan sah dan selanjutnya atau sebagai pilihan lain bahawa persetujuan itu terbatal di sisi undang-undang dan bahawa beliau berhak menuntut pengembalian semua bayaran yang telah dibuatnya kepada defendan berkenaan persetujuan itu. Persetujuan pertama adalah untuk jualan dua bidang tanah oleh defendan ketiga kepada plaintif. Persetujuan kedua adalah untuk jualan dua saham \$1 tiap-tiap satu dalam suatu syarikat kepada plaintif. Pada 12 Mac, satu injuksi ex parte telah diperolehi oleh Golden Scoope Sdn Bhd terhadap defendan ketiga dalam suatu guaman untuk menyekat defendan ketiga 'daripada menjual, melupuskan, menyewa, memindahmilik atau dalam apa cara sekalipun membuat urusan berkenaan' tanah itu. Sehingga 2 Mac 1991 injuksi itu masih belum diketepikan.

Pada 10 April 1990, plaintif menamatkan persetujuan itu. Telah diujahkan bagi plaintif bahawa kedua-dua persetujuan itu berhubung dengan satu transaksi, iaitu bahawa jualan tanah-tanah itu dan jualan saham-saham itu adalah saling bergantung. Telah diujahkan bahawa terdapat satu syarat nyata atau tersirat sesara lisan bahawa persetujuan jualan saham itu adalah tertakluk kepada persetujuan jualan tanah itu dan bahawa ia akan tamat jika persetujuan jualan tanah itu ditamatkan akibat keingkaran defendan ketiga.

Plaintif memohon untuk kebenaran mencatatkan penghakiman terus. Defendan-defendan menafikan bahawa kedua-dua persetujuan itu adalah saling bergantung dan berhubung kepada satu transaksi. Juga diujahkan bahawa oleh kerana permohonan untuk penghakiman terus merangkumi satu tuntutan berdasarkan salah nyataan fraud, plaintif tidak berhak mendapat penghakiman terus memandangkan O 14 k 1(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980. Juga diujahkan bahawa oleh kerana tarikh penyempurnaan persetujuan jualan tanah itu adalah 18 April 1990, iaitu tarikh di mana permohonan untuk perintah pengetepian injuksi dijadualkan untuk pembicaraan, tindakan plaintif membatalkan persetujuan itu pada 10 April 1990 adalah terlalu awal dan lantaran itu plaintif sendirilah yang telah menolak (repudiate) persetujuan itu sebelum tarikh penyempurnaan. Oleh kerana itu, telah diujahkan bahawa perlaksanaan kewajipan defendan ketiga untuk menyerahkan pemilikan kosong tanah-tanah itu kepada plaintif telah ditangguhkan secara tak terhad mengikut operasi s 52 Akta Kontrak 1950. Di pembicaraan permohonan plaintif, peguamacaranya memberitahu bahawa plaintif akan menggugurkan tuntutan berdasarkan fraud.

Diputuskan, menolak sebahagian permohonan plaintif:

- (1) Dakwaan bahawa defendan ketiga telah gagal mendedahkan persetujuan sewa dengan Golden Scoope tidak boleh disifatkan sebagai satu dakwaan atas fraud. Ia cuma mengukuhkan tuntutan

- plaintif bahawa defendan ketiga tidak dapat meyerahkan pemilikan kosong tanah-tanah itu oleh kerana bebanan yang disebabkan oleh persetujuan sewa itu dan perintah dan notis pemajuan Dewan Bandaraya menghalang mereka daripada berbuat demikian.
- (2) Dakwaan defendan pertama, bertindak bagi pihak defendan ketiga, membuat representasi kepada plaintif yang palsu atau yang dibuat secara melulu tanpa mengendahkan sama ada representasi itu benar atau palsu jatuh dalam lingkungan fraud. Walau bagaimanapun, peguamacara plaintif telah mengatakan dengan jelas bahawa plaintif akan menggugurkan tuntutan atas fraud. Tidak ada sekatan undang-undang terhadap plaintif menggugurkan plidingnya atas salah nyataan di dalam permohonannya untuk penghakiman terus asalkan beliau tidak mencuba menggunakan secara langsung atau tidak langsung salah nyataan itu untuk menyokong kesnya. Plaintif tidak boleh disekat daripada memohon untuk penghakiman terus tentang dua kausa tindakan yang pertama yang berdasarkan keingkaran persetujuan jualan tanah dan kekecewaan persetujuan itu.
- (3) Tidak ragu lagi bahawa defendan ketiga telah mengikat satu persetujuan sewa dengan Golden Scoope Sdn Bhd untuk menyewa tingkat bawah bangunan baru yang akan dibina di atas tanah-tanah itu. Juga tidak ada keraguan bahawa persetujuan sewa itu telah dibuat di belakang plaintif. Setelah menjual tanah itu kepada plaintif, defendan ketiga tidak berhak mengikat satu persetujuan sewa tanpa pengetahuan plaintif. Dalam berbuat demikian, defendan ketiga jelasnya telah mencatatkan kebolehan menyerahkan pemilikan kosong tanah itu kepada plaintif di bawah persetujuan itu sedangkan plaintif sedia dan boleh membayar harga pembelian secara penuh menjelang tarikh penyempurnaan yang telah dipersetujui.
- (4) Injunksi yang diperolehi oleh Golden Scoope Sdn Bhd membawa kesan mengecewakan persetujuan jualan tanah itu.
- (5) Plaintif berhak membatalkan persetujuan jualan tanah itu oleh kerana keingkaran persetujuan oleh defendan ketiga dan injunksi yang menghalangnya daripada menyempurnakan persetujuan itu.
- (6) Walaupun persetujuan jualan tanah dan persetujuan jualan saham itu dilaksanakan pada tarikh yang sama, namun demikian tidak ada apa-apa sama ada di dalam persetujuan jualan tanah atau persetujuan jualan saham itu yang menunjukkan bahawa keduanya berhubung dan perlaksanaannya saling bergantung. Di peringkat interlokutori ini adalah susah kalau tidak pun mustahil untuk menyelesaikan isu itu. Plaintif telah gagal mendirikan biarpun satu kes prima facie untuk menyokong haknya membatalkan persetujuan jualan saham itu dan lantaran itu tidak berhak memperoleh penghakiman terus atas isu itu.]

[*Editorial Note:* The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-299-91.]

A Cases referred to

- 1 *Derry v Peek* (1889) 14 App Cas 337 (folld)
- 2 *Barclays Bank Ltd v Cole* [1967] 2 QB 738 (folld)
- 3 *Newton Chemical Ltd & Ors v Arsenis* [1989] 1 WLR 1297 (folld)
- 4 *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1990] 2 MLJ 385 (distd)

- 5 *Caltex Oil (M) Sdn Bhd v Ho Lai Yoke* [1964] MLJ 76 (distd)
- 6 *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 (refd)
- 7 *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd* [1991] 2 MLJ 251 (refd)

- 8 *Re HEH The Nizam's Jewellery Trust* AIR 1980 SC 17 (folld)
- 9 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 41 ALR 367 (folld)

Legislation referred to

Contracts Act 1950 ss 40, 52, 57(2)

Control of Rent Act 1966 s 19(ix)

- D Rules of the High Court 1980 O 14 r 1(1)(b), (2)(b), O 24 r 7
- Administration of Justice (Miscellaneous Provisions) Act 1933 [UK] s 6(1)

Theft Act 1968 [UK] s 17(1)(a)

Rules of the Supreme Court 1965 [Eng] O 14 r 1(2)

- E Rules of the Supreme Court 1970 [Sing] O 14 r 1(2)(b)

Wong Chong Wah and Lee Hock Beng (HB Lee & Co) for the plaintiff.
RS Nathan (Shearn Delamore & Co) for the defendants.

Cur Adv Vult

- F **Lim Beng Choon J:** This was an application made by the plaintiff on 10 May 1990 by way of summons-in-chambers (encl 3B) in which he sought leave to enter summary judgment pursuant to O 14 of the Rules of the High Court 1980 ('the RHC') against the three defendants based on the following reliefs and claims as set out in his statement of claim. The reliefs sought
- G by the plaintiff were for declaratory orders that the two agreements both dated 19 January 1990 entered by him with the third defendant, TCC Holdings Sdn Bhd, in the first agreement, and with the first and second defendants in the second agreement, were lawfully rescinded by the plaintiff. Further and in the alternative he claimed that the agreements were void in law and that the plaintiff was entitled to claim a refund of all the
- H payments made by him to the three defendants in respect of the two agreements.

The plaintiff's writ endorsed with his statement of claim was filed on 18 April 1990. He amended his statement of claim on 8 May 1990. The three defendants after entering appearance filed their joint statement of defence on 23 May 1990 (encl 4). I do not propose to set out the averments made in the plaintiff's statement of claim and the averments set out in the statement of defence because in the written submissions of counsel for the plaintiff dated 2 March 1991, he had neatly summarized certain facts that were not disputed and counsel for the defendants, with certain exceptions,

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generally agreed to the correctness of those undisputed facts. I shall be able to arrive at a decision based on those facts. If need be I shall refer to certain matters as set out in the pleadings and in the several affidavits filed either in support of the parties' respective cases or in rebutting the opponent's allegations.

On 30 May 1990, the plaintiff applied for a Mareva injunction to restrain the first and/or the second defendants whether by themselves, their servants, etc from removing from the jurisdiction, selling, disposing of, charging, pledging, transferring or otherwise howsoever dealing with their assets within the jurisdiction in so far as the same did not exceed the sum of \$2,806,024. In his application the plaintiff named the sources of the assets of the defendants and also asked for an order under O 24 r 7 of the RHC or inherent jurisdiction of the court requiring the defendants to disclose the value, nature and whereabouts of all their assets in particular the sum of \$2,806,024 paid to the defendants by the plaintiff. At the ex parte hearing of the plaintiff's application for the Mareva injunction on 26 July 1990 I granted an order in terms of his application subject to the usual undertaking to pay damages should subsequently the plaintiff be found to have wrongfully obtained the said injunction.

On 7 August 1990 the defendants applied to set aside the said Mareva injunction and alternatively to vary the said injunction to enable the defendants to draw reasonable living expenses not exceeding such sum as was just in the circumstances but not less than \$5,000 per week. They also asked for a reasonable sum to pay such liabilities as were or had been or would be reasonably incurred in the ordinary course of business of the three defendants. By consent the said injunction was varied on 4 September 1990 to allow the defendants to withdraw a sum of \$20,000 per month from their account with the Oriental Bank Bhd Kuala Lumpur.

Reverting to the facts that are not in dispute, they are as follows:

- (i) There are two written agreements both dated 19 January 1990 made between the following parties:
 - (a) An agreement between the plaintiff and the third defendant, TCC Holdings Sdn Bhd, under which the third defendant agreed to sell and the plaintiff agreed to buy two pieces of property held under Grant No 9606 for lot 437, section 57 and Grant No 9607 for lot 438, section 57 ('the properties') both in the town of Kuala Lumpur known as No 82 and 84 Jalan Bukit Bintang Kuala Lumpur ('the land sale agreement').
 - (b) An agreement between the plaintiff and the first and second defendants under which the first and second defendants agreed to sell and the plaintiff to purchase the whole of the issued capital of two shares of \$1 each in WinDollars Sdn Bhd ('the share sale agreement').
- (ii) The land sale agreement between the plaintiff and the third defendant contained, inter alia, the following terms:
 - (a) Clause 1: In consideration of \$980,000 paid by the plaintiff to the third defendant, the latter agreed to sell the properties at the purchase price of \$4.9m 'free of all encumbrances and with vacant possession'.

- A** (b) Clause 2(i): The balance of the purchase price of \$3.92m would be paid by the plaintiff to M/s AJ Ariffin Chong & Harpal (amalgamated with M/s CC Choo & Co Advocates and Solicitors) as stakeholders within three months of the date of the agreement, ie by 18 April 1990. There was, however, a provision for extension of time and this provision reads: 'In the event the purchaser shall fail to deposit the said balance of the purchase price with the said solicitors within the time period herein stipulated, the vendor shall upon the request of the purchaser grant the purchaser a further extension of time of one (1) month to deposit the said balance of the purchase price with the said solicitors provided always the purchaser shall pay interest of ten percent (10%) on the balance of the purchase price remaining yet unpaid.'
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- C** (ii) The period of three (3) months and the extension of one (1) month as stated under cl 2(i) above or such other date as hereinafter agreed upon in writing shall be referred to as the completion date.
- D** (c) Clause 2(iii): Vacant possession of the said property shall be delivered by the vendor to the purchaser upon payment of the balance of the purchase price to the vendor in full.
- E** (d) Clause 5.1: The solicitors named in the land sale agreement was claimed by the plaintiff to be acting for both the plaintiff and the third defendant as common solicitors in the land sale agreement and were authorized to do various things to complete the transactions. But counsel for the defendants could not agree to this interpretation of the plaintiff of cl 5.1 and argued that the said solicitors were common solicitors only within the ambit of the specific delineation of duties stated in the land sale agreement.
- F** The said solicitors were in all other respects the solicitors for the plaintiff/purchaser and not the third defendant's solicitors.
- G** (e) Clause 10.4: In consideration of delivery of the properties by the third defendant to the plaintiff, the purchaser would pay a further sum of \$111,024 as compensation to the tenants of the properties.
- (f) Clause 10.5: The plaintiff agreed to pay a further sum of \$30,000 towards costs of demolition and clearance of debris to the properties.
- (g) Clause 17: Time would be the essence of the contract.
- H** (iii) The share sale agreement contained, inter alia, the following terms:
- (a) Clause 1: In consideration of the payment of the purchase price of \$1.6m by the plaintiff to the first and second defendants, the latter would sell to the former the two shares in WinDollars Sdn Bhd.
- I** (iv) Pursuant to the two agreements the plaintiff made the following payments:
- (a) On 13 January 1990, \$100,000 to the third defendant.
- (b) On 17 January 1990, \$2.48m to the common solicitors. The two receipts issued by the common solicitors for \$1.6m and \$800,000

- described the payments as payments towards the purchase price of the properties which is erroneous as can be seen later. **A**
- (c) On 16 February 1990, \$141,024 to the third defendant. The letter from the common solicitors to the third defendant dated 16 February 1990 described the payment as payment under cl 10(iv) and cl 10(v) (reproduced above) of the land sale agreement where \$30,000 was payment for demolition and clearance of debris and \$111,024 was payment for delivery of vacant possession. **B**
- (d) On 23 January 1990, \$65,000 as commission to one Dato Hui Guan Lian agent for both parties.
- (e) On 25 January 1990, \$20,000 to the common solicitors as legal fees. It will be noted that the first two payments mentioned in (a) and (b) above totalling \$2,580,000 were paid for the following purposes: **C**
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|--|--------------------|----------|
| (1) As deposit under the land sale agreement | \$980,000 | |
| (2) As full payment of the purchase price under the share sale agreement | \$1,600,000 | D |
| | <u>\$2,580,000</u> | |
- (v) The properties are subject to a development order by Dewan Bandaraya Kuala Lumpur ('DBKL') of 17 March 1989 approving the application made by the first defendant to convert the use of the two-storey building from shop to restaurant for the ground floor and residence for the first floor. This was followed by a letter by DBKL dated 31 October 1989 informing the third defendant that as the tenant had vacated the properties, construction on the properties must commence on or before 30 April 1990 otherwise action would be taken under s 19(ix) of the Control of Rent Act 1966 (Rev 1988). **E**
- (vi) On 12 March 1990, an ex parte injunction was obtained by one Golden Scoope Sdn Bhd ('Golden Scoope') against the third defendant in Kuala Lumpur High Court Civil Suit No S6-22-102-90 restraining the third defendant 'from selling, disposing, renting, transferring or in any way dealing with' the properties. **F**
- (vii) The ex parte injunction order was served on the common solicitors on 4 March 1990. The basis upon which Golden Scoope had obtained the ex parte injunction was that the third defendant had agreed to grant them a three-year tenancy of the properties from the date of the issuance of the certificate with an option to renew for a further three-year period. Golden Scoope in their statement of claim had prayed for specific performance of the tenancy agreement and for damages. **G**
- (viii) The third defendant had applied to set aside the ex parte injunction. The hearing of the application was fixed for 15 April 1990 but it was postponed to 5 June 1990. Up to 2 March 1991 the injunction still had not been set aside. **H**
- (ix) The plaintiff through his solicitors M/s HB Lee & Co rescinded the two agreements on 10 April 1990. **I**

Based on the aforesaid undisputed facts counsel for the plaintiff submitted that the plaintiff was entitled to obtain summary judgment on the grounds that:

- A** (a) the defence of the defendants was a sham defence;
(b) there was a fundamental breach of the two agreements by the defendants;
(c) alternatively, the two agreements had been avoided by the doctrine of frustration.

B He also contended that the land sale agreement and the share sale agreement were related to one transaction, ie the sale of the properties and sale of the shares were interdependent on each other. There was an orally expressed or implied term that the share sale agreement was subject to the land sale agreement and that it would determine if the land sale agreement should be terminated by reason of the default of the third defendant.

C Although counsel for the plaintiff had put up a comprehensive and useful written submission with authorities to support the application of the plaintiff for summary judgment, I do not with due respect, propose to set out the contents of his written submission as I shall be referring to some of the relevant points raised by him and the authorities cited by him in his written submission later in this judgment.

D Turning to the defence, counsel for the defendants too had put up a comprehensive and useful written submission supported by authorities. Again, with due respect, I do not propose to set out his submission. I need only give an outline of his submission at this stage as I shall be referring to the more pertinent points of his submission later in this judgment.

E Counsel for the defendants firstly submitted that the defendants refuted the assertion of the plaintiff that the land sale agreement and the share sale agreement were interdependent and related to one transaction. The next important point raised by him was that as the application of the plaintiff for summary judgment 'includes' a claim (whether in the alternative or not is of no import) based on fraudulent misrepresentation, the plaintiff is not entitled to obtain summary judgment by virtue of O 14 r 1(1)(b) of the RHC which says that an application for summary judgment under that order is not applicable to an action which includes a claim by the plaintiff based on an allegation of fraud.

F In any event, even assuming (so submitted by counsel) that the court could consider the causes of action based on the claims of breach of contract and frustration, counsel for the defendants contended that the application of the plaintiff for an O 14 judgment was premature because as at the date of filing of the present action of the plaintiff on 18 April 1990, the completion date of the land sale agreement had not expired yet — the expiry date for the handing over of vacant possession of the properties was to take place only on 18 April 1990. Furthermore, the plaintiff's solicitors were notified by the defendants' solicitors that the application to set aside the ex parte injunction obtained by Golden Scoope had been filed by the defendants in Civil Suit No S6-22-102-1990 and was fixed for hearing on 18 April 1990. There was always the possibility that the injunction would

H and could in fact be set aside on that date being the last day of the completion of the land sale agreement. Yet the plaintiff elected to rescind the land sale agreement without waiting for the outcome of the application of the defendants to set aside the said ex parte injunction. Thus the plaintiff in giving notice to rescind the said agreement was himself repudiating the said agreement on 16 April 1990. By this action of the plaintiff the obliga-

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tion of the third defendant to deliver vacant possession of the properties would in any event be postponed *indefinitely* by the operation of s 52 of the Contracts Act 1950 which reads:

When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Counsel also contended that the third defendant had not accepted the plaintiff's purported rescission of the said agreement. Conversely by the premature rescission, the plaintiff had disabled himself from proceeding further and had unequivocally manifested a complete absence of readiness and willingness to perform which was a crucial element in the concept of anticipatory breach, which concept the plaintiff placed heavy reliance on. The application of the third defendant in Civil Suit No S6-22-102-1990 to set aside the ex parte injunction had not been able to proceed because of, inter alia, the retirement of the trial judge.

As the forefront of the defendants' defence is that the plaintiff is precluded from obtaining a summary judgment pursuant to O 14 of the RHC since his action is based on an allegation of fraud, I shall deal first with this issue. Under O 14 r 1(2) it is provided that:

Subject to paragraph 3, this rule applies to every action begun by writ other than one which *includes* —

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(b) a claim by the plaintiff based on an allegation of fraud,

Order 14 r 1(2) of the RHC is worded in the same way as O 14 r 1(2) of the English Rules of Supreme Court 1965. It would seem that in England the rule was retained as a consequence of s 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933 which provides:

Subject as hereinafter provided, if, on the application of any party to an action to be tried in the King's Bench Division of the High Court made not later than such time before the trial as may be limited by rules of court, the Court or a judge is satisfied that —

(a) a charge of fraud against that party; or

(b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage,

is in issue, the action shall be ordered to be tried with a jury unless the Court or judge is of opinion that the trial thereof requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury; but, save as aforesaid, any action to be tried in that Division may, in the discretion of the Court or a judge, be ordered to be tried either with or without a jury.

However, in Malaysia, there is no similar provision for trial by jury in civil cases and therefore no reason exists at all for the retention of O 14 r 1(2)(b). Nonetheless, as the rule is included in O 14, I cannot ignore it regardless of my personal view. But in order that a defendant can claim the exception under O 14 r 1(2)(b), it must be shown that the claim of the plaintiff based on a charge of fraud must mean 'deceit', ie 'a false representation made knowingly or without belief in its truth or recklessly, careless whether it be

- A true or false' (per judgment of Lord Herschell in *Derry v Peek*¹ at p 374). Lord Herschell's proposition was adopted in *Barclays Bank Ltd v Cole*² where Lord Denning MR said at p 744:

- B Likewise in law 'fraud' is proved when it is shown that a false representation has been made knowingly without belief in its truth, or recklessly, careless whether it be true or false: see *Derry v Peek*, per Lord Herschell. In any case, 'fraud' involves a false representation.

Lord Diplock in the same case agreed with the said proposition in the following passage of his judgment at pp 744-745:

- C If the expression 'a charge of fraud' has a special meaning in this context as a term of art, that special meaning must be ascribed to it. I think it has. For at least 100 years (see Bullen and Leake, *Precedents of Pleadings* (3rd Ed) (1868)) 'fraud' in civil actions at common law, whether as a cause of action or as a defence, has meant an intentional misrepresentation (or, in some cases, concealment) of fact made by one party with the intention of inducing another party to act upon it, which does induce the other party to act upon it to his detriment.

- D A more recent English case which deals with the scope of O 14 r 1(2)(b) is *Newton Chemical Ltd & Ors v Arsenis*³ (a case relied by the plaintiff in this action). Briefly the facts are that in 1984 the plaintiffs, manufacturers of toiletry products, had engaged the defendant as a self-employed sales representative and had paid him on a commission basis. In 1987 the plaintiffs discovered that the defendant had been fabricating orders from retail chemists and they commenced proceedings against him for repayment of commission and for sums in respect of bonus goods. In subsequent criminal proceedings in respect of those matters, the defendant pleaded guilty to a number of charges of false accounting contrary to s 17(1)(a) of the Theft Act 1968. Although the allegations made by the plaintiffs in their statement of claim against the defendant were based solely on his breaches of contract and fiduciary duty and his negligence it contained one paragraph, ie para 6(8) which reads (at p 1301):
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- G The defendant submitted diverse claims for commission and received and/or accepted payment of commission from the first plaintiffs in respect of the purported orders which were not genuine and/or were wholly or partly fabricated by the defendant and/or where: (i) no sale of such products was, in fact, made; and/or (ii) the numbers and/or value of such products actually sold was less than the amount and/or value thereof appearing on invoices and/or sales reports submitted and/or made up by the defendant.

- H Apparently based on that pleading, the defendant resisted the summons for summary judgment taken out by the plaintiffs on the ground that the plaintiffs' statement of claim 'was based on an allegation of fraud against him and they were accordingly precluded under O 14 r 1(2)(b) from obtaining summary judgment'. The judge on hearing the summons upheld the defendant's case and refused the plaintiffs' application. The matter then moved on to the Court of Appeal. It was contended at the Court of Appeal that the said paragraph contained all the necessary ingredients of *Derry v Peek*¹ fraud: by submitting claims for commission on fabricated orders, the defendant made to the plaintiffs a representation which the defendant knew to be untrue, and he intended the plaintiffs to rely and act on that represen-
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tation by paying the commission claimed. Furthermore para 6(8) of the statement of claim and also para 6(9), which made like allegations regarding claims by the defendant for reimbursement of expenses, were followed by a reference for further particulars to two affidavits where the words 'fraud' and 'fraudulent' were used to describe the defendant's conduct. That being so, the argument continued, the action came within O 14 r 1(2)(b) even though the plaintiffs have chosen not to put forward a claim for damages for the tort of deceit. Nicholls LJ rejected the propositions raised by the defendant's counsel and held that paras 6(8) and 6(9) regarding 'the submission of false claims for commission and expense are allegations of breaches of contract, breaches of fiduciary duty and breaches of duty of care'. In short what his Lordship said was that the allegations of false claims for commission or expense were allegations *in support* of the plaintiffs' allegations or claims for breaches of contract, breaches of fiduciary duty and breaches of duty of care.

Reverting to the present case let us examine the relevant part of the averments of the plaintiff in his statement of claim concerning the land sale agreement.

In para 3.2 of his amended statement of claim, the plaintiff cited the various express terms of the land sale agreement which I have reproduced earlier. He then went on to say:

the third defendant by its servant or agent and/or the first and second defendants should disclose to the plaintiff all material facts affecting the title to the said properties or the price of the said properties.

In para 7 of his statement of claim he claimed:

In breach of the several terms of the first sale agreement as set out in para 3.2 above the defendants:

- (a) were unable to complete the sale of the said properties on or about 18 April 1990 by reason of the interim injunction dated 12 March 1990 issued by the High Court of Kuala Lumpur and obtained by one Golden Scoope Sdn Bhd (hereinafter referred to as 'Golden Scoope') such disability being caused by the default of the defendants under the first sale agreement;
- (b) were unable at all material times (to) deliver to the plaintiff the said properties free from encumbrances and with vacant possession as the defendants had an existing tenancy arrangement with Golden Scoope as from 23 November 1989 and that the said properties are at all material times subject to a development order dated 31 October 1989 made by the Dewan Bandaraya Kuala Lumpur under the Control of Rent Act 1966, which fact was not made known to the plaintiff at the relevant times;
- (c) failed to disclose the said tenancy agreement with Golden Scoope and/or such claims of Golden Scoope and the said development order or notice dated 31 October 1989 from the Dewan Bandaraya, Kuala Lumpur.

Then in para 8 the plaintiff went on to claim:

Further and/or in the alternative the first sale agreement is frustrated by the legal suit of Golden Scoope against the third defendants vide Kuala Lumpur High Court Suit No S6-22-102-1990 and in particular the interim injunction dated 12 March 1990 obtained therewith against the third defendant which restrains the third defendant its servant or agents from 'selling disposing renting transferring or in any way dealing' with the said properties.

- A** It is only in paras 9.1 to 9.4 did the plaintiff pray in the alternative that the third defendant misrepresented to him that he could put up whatever building he liked on the properties, failing to reveal to him that the properties were subject to a development order dated 31 October 1989 issued by DBKL under the Control of Rent Act 1966 and that there was an existing tenancy arrangement with Golden Scoope on 23 November 1989. It is in para 9.4 that the plaintiff for the first time alleged that the first defendant fraudulently made the representation knowing them to be false or made recklessly, not caring whether they were true or false.

- B** From his statement of claim the plaintiff has three causes of action based on his claim of breaches of the land sale agreement, frustration of the said agreement and claim founded on fraud. However that may be, the first two causes of action based on the claims of breaches of the land sale agreement and frustration of that agreement relied on by the plaintiff did not include the ingredient of *Derry v Peek*¹ fraud. To succeed in his claim for breaches of the said agreement all that the plaintiff has to do is to establish that the defendants have committed a breach of one or more of the fundamental terms of the said agreement. Likewise in alleging frustration of the said agreement all that is required of him is to establish that the said agreement has been frustrated by an intervening event. Strictly on the first two pleaded causes of action, it will be sufficient if the plaintiff proves that, however the claims came to be made, the third defendant was unable or had disabled itself from delivering to the plaintiff the properties free from encumbrances on or before the stipulated time of delivery of vacant possession, ie by 18 April 1990 provided the plaintiff was at the material time able and willing to perform his part of the bargain, namely, to pay the full purchase price. It is true that in sub-para (c) of para 7 of the statement of claim the plaintiff had alleged that the defendants had failed to disclose the tenancy agreement with Golden Scoope and the DBKL's development order or the DBKL's notice of 31 October 1989. That subparagraph cannot be construed as an allegation of fraud within the meaning as laid down in *Derry v Peek*;¹ it merely fortified the plaintiff's claim that because of the said tenancy agreement and the said development order and notice the third defendant was not able to deliver vacant possession of the properties as the encumbrances caused by the tenancy agreement and the DBKL's order and notice prevented them from doing so. It is also true that in paras 9.1 to 9.4 the plaintiff pleaded that the first defendant acting on behalf of the third defendant made representations to him which were false or which were made recklessly, not caring whether they were true or false. Such allegations
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- H** no doubt fall within the *Derry v Peek*¹ fraud. But at the hearing of the plaintiff's application counsel for the plaintiff said quite clearly in his submission that the plaintiff would abandon such a claim of fraud. In other words the plaintiff would not rely on the alleged misrepresentations purportedly made by the first defendant to support his application for summary judgment under O 14 of the RHC. There is no legal inhibition against the plaintiff's abandonment of his pleadings of misrepresentation for summary judgment so long as he does not attempt to utilize directly or indirectly the misrepresentation to support his case. I should also mention that in the Singapore case of *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd*,⁴ it was held that where a claim was one based on fraud in the technical sense
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with the ingredients of the tort of deceit as used in *Derry v Peek*¹ the plaintiff could not rely on O 14 r 1(2)(b) of the Singapore Rules of the Supreme Court 1970 to get summary judgment. That case, however, is distinguishable in that the causes of action as pleaded in the statement of claim read as follows:

- 7 The defendants at the time when they issued or caused to be issued the said first, second and third bills of lading knew and/or ought to have known that the said representations contained therein were untrue and/or were made recklessly not caring whether they were true or false.
- 11 Further and/or alternatively, at the time when the said representations were made, the defendants well knew or ought to have known that the plaintiffs would rely on the said representations and would be induced thereby to accept the said first, second and third bills of lading under the said letter of credit.
- 12 In the premises, the defendants were under a duty to take care in making the representations.
- 15 In breach of the said duty, the defendants were negligent in making the representations.

From the pleadings in that case it is clear that the main cause of action of the plaintiffs was based on the *Derry v Peek*¹ fraud. In the alternative pleading of negligent misstatement it was held that the allegation of negligence could not succeed as the defendants had in their pleadings succeeded in raising triable issues against this claim.

From the above discussions I am satisfied that the plaintiff cannot be precluded from applying for summary judgment pursuant to O 14 of the RHC in respect of his first two causes of action based on breaches of the land sale agreement and frustration of the said agreement.

The next question is whether the plaintiff has made out a case which is virtually uncontestable. In support of his causes of action based on the claims of breaches of the land sale agreement and frustration of the said agreement the plaintiff is relying on the fact that the third defendant was not able to deliver vacant possession of the properties by 18 April 1990 because of

- (a) the order of DBKL approving the conversion of the land use of the properties from partial commercial purpose to fully commercial purpose and the notice requiring the new two-storey building to be constructed on or before 30 April 1990;
- (b) the tenancy agreement entered into by the third defendant with Golden Scoope whereby the third defendant agreed to let out the ground floor of the new building to be built on the properties to Golden Scoope; and
- (c) the interlocutory injunction obtained by Golden Scoope restraining the third defendant its agents or servants from selling, disposing, renting transferring or in any way dealing with the ground floor of the properties.

The plaintiff therefore claimed that based on these three grounds the third defendant was in breach of the land sale agreement and/or the said agreement had been frustrated and he had the right to rescind the said agreement particularly when he was at all material times able and willing to perform his part of the bargain, ie to pay the full purchase price. His claim regarding his

- A** ability to pay the full purchase price had not been challenged by the defendants.

Turning once again to the three grounds I am satisfied that the third defendant had raised triable issues as regards to ground (a) concerning the DBKL order and notice and I say so for these reasons. Although the plaintiff in his affidavit (encl 3B) in support of his application for summary judgment said that he was completely unaware of the DBKL order and notice until after he had signed the land sale agreement, the third defendant on the other hand in an affidavit (encl 13) affirmed by the first defendant who was and I believe still is the director of the third defendant contended that the first defendant attended a meeting on 12 January 1990 at the third defendant's office with the plaintiff together with his interpreter and solicitor. At the meeting the plaintiff was made to understand the contents of the order and notice of DBKL. Indeed the plaintiff had paid a sum of \$111,024 to the previous tenants of the properties to enable the conversion of use of land to be approved by DBKL and the consequential displacement of the tenant who had previously resided in the rent controlled premises on the properties. Based on these conflicting affidavit evidence ground (a) relied on by the plaintiff cannot possibly be resolved at this interlocutory stage.

As to ground (b) and (c) concerning the tenancy agreement of Golden Scoope and the interlocutory injunction obtained by them there is no doubt that the third defendant had entered into a tenancy agreement with Golden Scoope to let out the ground floor of the new building which was to be built on the properties. The third defendant even showed the plans of the internal layout of the proposed tenanted premises and Golden Scoope suggested certain alterations to be made to the plans. More surprisingly is that the third defendant had admitted that it did receive a security deposit for the tenancy from Golden Scoope payable to a firm of solicitors as stakeholder (see exh TCC6 of encl 13). The third defendant now turns round and says that the agreement in the form of a letter was 'understood' to mean that it would be subject to a formal contract setting out the relevant terms and conditions of the tenancy. If that be so it should produce the said letter for sight of the court. In failing to do so I cannot accept its bare words particularly when the plaintiff had managed to produce a copy of the draft tenancy agreement containing all the essential terms of the tenancy which had been signed by Golden Scoope and their guarantors and it was stated that the said tenancy agreement was irrevocable. It was based on this tenancy agreement that Golden Scoope has sued the third defendant for specific performance. Not only had the third defendant failed to rebut this tenancy agreement it even made no attempt to rebut the agreement but rather chose to rely on a purported earlier letter which it had never produced. In the circumstances s 114 of the Evidence Act 1950 would adversely apply against the third defendant.

There is equally no doubt that the tenancy agreement entered between the third defendant and Golden Scoope was made behind the back of the plaintiff — he knew nothing about it until late March 1990 when Peat Marwick, apparently the plaintiff's financial advisers, caused a search to be made with the court and the plaintiff was told about the tenancy suit filed by Golden Scoope and the injunction obtained by them on 12 March 1990 against the third defendant. On receipt of this information the plaintiff

therefore instructed his solicitors, who duly did so, to rescind the land sale agreement as well as the share sale agreement effective from 10 April 1990.

Now having sold the properties to the plaintiff the third defendant had no right to enter into a tenancy agreement with Golden Scoope without the knowledge of the plaintiff to let out the ground floor of the new building which had yet to be constructed on the properties. In doing so clearly the third defendant disabled himself from delivering vacant possession of the properties to the plaintiff under cl 2(iii) which I have set out earlier.

Counsel for the defendants, in his submission opposing grounds (b) and (c) relied on by the plaintiff, contended that the plaintiff's solicitors were notified by the defendants' solicitors that the application to set aside the injunction in KL High Court Suit No S6-22-106-1990 was fixed for hearing for 18 April 1990. There was always the possibility that the injunction would and could in fact be set aside on that day (18 April 1990) which was also the last day for completion under the land sale agreement. The rescission of the agreement by the plaintiff was therefore premature in that at the time of rescission, it could not be said with any degree of certainty that the defendants would clearly fail to deliver vacant possession. The element of anticipatory breach relied on by the plaintiff could not apply. In fact the converse was the case. The plaintiff was himself repudiating the agreement and by virtue of s 52 of the Contracts Act 1950 which reads:

When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

It was clear that the third defendant need not perform its promise if the plaintiff who simultaneously had to perform a reciprocal promise was not ready or willing to do so. Counsel cited the case of *Caltex Oil (M) Sdn Bhd v Ho Lai Yoke*⁵ to support his contentions. I shall consider the principles laid down in this case later. For this reason the delivery of vacant possession was indefinitely postponed by operation of the said s 52.

With due respect counsel for the defendants in his submission had inadvertently overlooked the provision of s 40 of the Contracts Act 1950 which reads:

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put to an end to the contract, unless he had signified, by words or conduct, his acquiescence in its continuance.

From the indisputable facts of this case the third defendant had even before the execution of the land sale agreement with the plaintiff entered into an agreement to let out the ground floor of the building yet to be built on the properties to Golden Scoope for a period of three years with an option to extend the tenancy. This by itself clearly shows that the plaintiff could not be able to obtain vacant possession of the properties by 18 April 1990. The defendants' argument that the said tenancy agreement had no lawful effect because it was subject to a formal agreement to be executed later is irrelevant. The fact that they had executed a tenancy agreement based on which Golden Scoope had instituted an action for specific performance of the same and the suit has yet to go on trial is indicative that the third

- A defendant would and could never be able to give vacant possession of the properties without any encumbrance to the plaintiff, particularly when Golden Scoope had obtained an interlocutory injunction against the third defendant from selling, disposing etc of the said properties to a third party. The third defendant had therefore disabled itself from performing its obligation under cl 2(iii) of the land sale agreement when the plaintiff was willing and able to pay the full purchase price by the date of completion, ie 18 April 1990. Thus it is said in *Universal Cargo Carriers v Citati*⁶ at p 436:
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The law on the right to rescind is succinctly stated by Lord Porter in *Heyman v Darwins Ltd* [1942] AC 356, 397 as follows: 'The three sets of circumstances giving rise to a discharge of contract are tabulated by Anson as: (1) renunciation by a party of his liabilities under it; (2) impossibility created by his own act; and (3) total or partial failure of performance. In the case of the first two, the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the course of performance.'

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- D The third of these is the ordinary case of actual breach, and the first two state the two modes of anticipatory breach. In order that the arguments which I have heard from either side can be rightly considered, it is necessary that I should develop rather more fully what is meant by each of these two modes.

A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renouncing must 'evinced an intention' not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.

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Again at p 441 it is said:

- F A party is deemed to have incapacitated himself from performing his side of the contract, not only when he deliberately puts it out of his power to perform the contract, but also when by his own act or default circumstances arise which render him unable to perform his side of the contract or some essential part thereof.

- G As to the case of *Caltex Oil (M) Sdn Bhd v Ho Lai Yoke*⁵ relied on by the defendants the said case has no application to the present case for in that case the defendants themselves were unable to perform their obligations and rescinded the contract on the ground that the plaintiffs were unwilling to perform their part of the agreement which the court found was not true. A passage from the judgment of the *Caltex* case⁵ is useful and should be cited (at p 79):

- H As to the first ground, I have no hesitation in saying that in my opinion cll 4 and 5 (set out in full at the beginning of this judgment) were reciprocal promises intended to be simultaneously performed within the meaning of s 52 of the Contracts (Malay States) Ordinance 1950. For my own part I shall need unambiguous express terms before reading into any contract for the sale and purchase of land in Malaya a stipulation that payment is a condition precedent to execution of transfer, contrary to well-established practice. (Emphasis is mine.)
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The aforesaid passage suggests that a vendor must be able willing and ready to execute a transfer of the land before the purchaser is required to pay up the full purchase price. In the present case the plaintiff has in his affidavit affirmed on 4 May 1990 (encl 3B) asserted that at all material times he had

the funds and moneys in Malaysia to make payment of the balance of the purchase price under the land sale agreement.

To make matters worse, Golden Scoope had succeeded in obtaining an interlocutory injunction restraining the third defendants from doing the things as stated earlier with regard to the properties. The injunction has the effect of frustrating the land sale agreement pursuant to s 57(2) of the Contracts Act 1950 which reads:

A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

I had occasion to deal with the issue of frustration in my judgment in *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd.*⁷ In that case I adopted the principle laid down by the Supreme Court of India in the case of *Re HEH The Nizam's Jewellery Trust*⁸ and an Australian High Court case of *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*.⁹ The principle shortly put is that when two parties had entered into a contract to do certain things pursuant to the terms and conditions of the contract and subsequently a third party succeeded in obtaining an injunction against one of the contracting party restraining him from carrying out his fundamental obligation or obligations under the contract, the result is the frustration of the contract and the innocent party to the contract need not perform his contractual obligations. In the present case Golden Scoope was granted the injunction on 12 March 1990 and it was a term in the land sale agreement that the completion date when the plaintiff was to pay the balance of the purchase price and the third defendant to deliver vacant possession of the properties was 18 April 1990 and time was the essence of the said agreement. Under such circumstances it is my considered opinion that the plaintiff acted reasonably and properly to rescind the land sale agreement on 10 April 1990. The third defendant, however, contended that as its solicitors had given notice to the plaintiff that it had applied to set aside the injunction and that the application was to be heard on 18 April 1990, the plaintiff should have waited until the hearing of the application before rescinding the said agreement. The third defendant claimed that there was a possibility of it succeeding in persuading the court to vacate the injunction. To my mind almost everything is possible but the element of possibility is not a defence in a civil or criminal case. Bearing in mind that the plaintiff is an innocent party and it is the third defendant itself who gave cause for Golden Scoope to file a suit against it and obtained the injunction, it is only proper that the plaintiff should take steps to safeguard himself. As it is the injunction has not been revoked even up to today!

There is therefore no doubt that the plaintiff has clearly established that he is entitled to rescind the land sale agreement for two reasons, viz (i) breach of the agreement on the part of the third defendant by entering into an agreement to let out the ground floor of the premises yet to be built on the properties and (ii) the injunction order preventing them from carrying into completion the said agreement. The third defendant has absolutely no defence to the claim of the plaintiff to rescind the said agreement.

It is to be noted that so far I have been considering only the land sale agreement. I have not dealt with the share sale agreement. In his assertion

A in his statement of claim the plaintiff said that the share sale agreement was an integral part of the land sale agreement and on this point his averments are as follows:

B 5.1 It was orally agreed between the parties at the material time that the second sale agreement was in verity part of the first sale agreement and was entered into for the purpose of the sale of the said properties and accordingly it was orally agreed between the parties that:

- (a) the \$1.6m paid by the plaintiff to the first and second defendants was for the purchase of the said properties
- (b) in the event the sale of the properties could not be completed by the defendants or any one of them for whatever cause or reason the first and second defendants shall repay to the plaintiff the sum of \$1.6m.

C 5.2 Alternatively it was, inter alia, an implied term of the second sale agreement that:

- (a) the said agreement is subject to the condition that there be a sale of the said properties under the first sale agreement;
- (b) in the event the first sale agreement is terminated by reason of default of the third defendant for whatsoever cause or reason the second sale agreement is also determined and the sum of \$1.6m shall be repaid to the plaintiff.

D 5.3 Pursuant to the matters stated in paras 5.1 and 5.2 the said solicitors prepared a memorandum of understanding on or about 5 March 1990 at the request of the plaintiff and the first and second defendants acting by themselves and/or on behalf of the third defendant and the said memorandum was approved by the plaintiff, his servant or agent but was refused approval by the defendants.

E In his affidavit (encl 3B) the plaintiff asserted that he was given to understand by the solicitors who dealt with the transaction of the sale of the properties, the first defendant and one Datuk Hui Guan, the agent who arranged for the sale of the properties, that the sale of the properties would involve an additional sale of a company belonging to the first defendant to overcome the requirement of obtaining the Foreign Investment Committee (FIC) approval. The plaintiff agreed as he trusted the said solicitors, the first defendant and Datuk Hui. The plaintiff also said he did not know what the FIC was and its function nor its guidelines and policy. In any event the plaintiff believed it was an understanding of all parties concerned that the subject matter of the sale under the two sale agreements was the said properties and for a total consideration of \$6.5m. It was for this reason that **F** the said solicitors prepared a memorandum of understanding on 5 March 1990 but the third defendant had not approved the said memorandum.

G In their reply the third defendant denied that there was an understanding amongst all parties concerned that the land sale agreement and the share sale agreement were linked and of which performance was inter-dependent. **H** The memorandum of understanding referred to by the plaintiff was never executed and in any event it was prepared well after the two agreements were signed. They also denied that the sale of WinDollars Sdn Bhd was designed at evading the FIC approval. **I**

On this issue it is to be noted that although the land sale agreement and share sale agreement were executed on the same day, namely, 19 January

1990, yet there is nothing either in the land sale agreement or the share sale agreement to indicate that the two were linked and of which performance was interdependent. At this interlocutory stage it is difficult, if not impossible, to resolve this issue. It might well be true that it is very strange that the plaintiff would have bought a \$2 company for \$1.6m but from a reading of the share sale agreement one cannot say with any degree of certainty that the said company had no other assets except the properties sold to the plaintiff or any other investments which could be yielding profitable returns. It might well be that the plaintiff bought the shares because of these other assets and investments and/or the goodwill of the business of the company which is the very sap and life of a business of a company without which the business would yield little or no fruit.

As regards to the memorandum of understanding, the fact that it came into existence well after the two said agreements had been executed raises a question as to why it was not made at the time or soon after the execution of the two said agreements. At any rate the first defendant had not affixed his signature to it. As to the FIC matter I must confess I do not know what the requirement of the FIC is in relation to a foreigner purchasing land in Malaysia and what advice the solicitor dealing with the transaction and Datuk Hui gave to the plaintiff. Again this matter cannot be resolved at this summary stage and must go on full trial of the case.

The end result of the above discussion is that I am satisfied that the plaintiff has failed to establish even a prima facie case to support his right to rescind the share sale agreement. He is therefore not entitled to summary judgment on this issue.

For the above reasons I shall make the following orders:

- (1) A declaration that the plaintiff had effectively rescinded the land sale agreement dated 19 November 1990 identified in para 3(1) of the statement of claim.
- (2) The plaintiff is entitled to be refunded the part payment of the purchase price amounting to \$980,000 and the sum of \$141,024 being payment under cl 10(iv) of the said land sale agreement.
- (3) The plaintiff is not entitled to enter summary judgment in respect of the share sale agreement identified in para 4 of the statement of claim. The issue must go for full trial of the case.
- (4) The sum of \$980,000 and the sum of \$141,024 mentioned in (2) above shall carry interest at the rate of 8% pa from 10 April 1990 (the date of rescission of the land sale agreement) to date of judgment and thereafter at the same rate of interest until realization.

As the plaintiff has partially succeeded in his application he is entitled to one half of the taxed costs to be paid by the third defendant.

Order accordingly.

Reported by PS Ranjan